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No.____

IN THE
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, ONE OF ITS TRUSTEES,
Petitioners,

v.

REIMER EXPRESS WORLD CORPORATION, A CANADIAN CORPORATION, AND REIMER EXPRESS ENTERPRISES LIMITED, A CANADIAN CORPORATION,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below err in holding that the Due Process Clause of the Fifth Amendment of the United States Constitution requires that certain types of contacts between the defendant and the forum state (*e.g.*, ownership by the defendant of a subsidiary that operates in the forum state) be deemed *per se insufficient* "minimum contacts" with the forum for purposes of personal jurisdiction—regardless of whether those contacts between the defendant and the forum gave rise to the specific claim at issue in the case?

2. Where the federal statute applicable to a particular case bases liability upon the defendant's corporate affiliation (as in the case of "controlled group" liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1381 *et seq.*), is it proper to ignore this statutory liability rule in determining whether a foreign parent corporation's affiliation with a United States-based subsidiary is a sufficient "minimum contact" with the U.S. for purposes of resolving the issue of personal jurisdiction under the specific jurisdiction doctrine?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Central States, Southeast and Southwest Areas Pension Fund (the "Pension Fund") is a multiemployer employee benefit plan and trust and has no corporate affiliations. Petitioner Howard McDougal is one of the Trustees of the Pension Fund and has no corporate affiliations.

Respondents

Respondent Reimer Express World Corporation is a Canadian corporation, and Respondent Reimer Express Enterprises Limited is a Canadian corporation.

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OPINIONS BELOW

The November 17, 2000 order denying rehearing and rehearing *en banc* by the United States Court of Appeals of the Seventh Circuit is set forth in Appendix A hereto (App. A at 1a-2a).

The October 18, 2000 opinion for the United States Court of Appeals for the Seventh Circuit is reported at *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corporation*, 230 F.3d 934 (7th Cir. 2000), and is set forth in Appendix B hereto (App. B at 3a).

BASIS FOR JURISDICTION

On October 18, 2000, the judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") was entered. On November 17, 2000, the Seventh Circuit denied a timely petition for rehearing with suggestion for rehearing en banc. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Employment Retirement Income Security Act, § 4001(b)(1), 29 U.S.C. § 1301(b)(1):

> An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

STATEMENT OF THE CASE

Petitioner (Plaintiff below) Central States, Southeast and Southwest Areas Pension Fund (the "Pension Fund" or "Central States") is a multiemployer employee benefit plan, within the meaning of § 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(37)(A). App. B at 4a. The Pension Fund is "among the largest Taft-Hartley trust funds in the United States . . . ." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 562, 105 S.Ct. 2833, 2836 n. 1 (1985). Subject matter jurisdiction in the district court was premised upon 29 U.S.C. § 1132(e), 1451(d).

Respondent (Defendant below) Reimer Express Enterprises Limited ("REE") is a holding company with its principal place of business in Winnipeg, Manitoba, Canada. App. B at 4a. In January 1986, REE became the indirect owner (the corporate "great-grandparent") of Inter-City Truck Lines, Inc.

("ICTL"). *Id.* Respondent (Defendant below) Reimer Express World Corporation (AREWCOR") became a wholly owned subsidiary of REE in 1993. *Id.*

ICTL was, like its corporate parents, a Canadian corporation. However, ICTL conducted trucking operations in the United States out of Detroit, Michigan. App. B at 4a. At all relevant times, ICTL contributed to the Pension Fund on behalf of its employees pursuant to a collective bargaining agreement with Local Union 299 of the International Brotherhood of Teamsters in Detroit, Michigan. *Id.*

On November 13, 1991, REE's Manager of Human Resources, faxed a "Fringe Benefit Agreement" to the Pension Fund's offices in Rosemont, Illinois from REE's offices in Canada. App. B at 5a. The fax cover sheet indicated that this transmission was from an entity called "REE/ICTL." *Id.* This Agreement extended ICTL's obligation to contribute to the Pension Fund on the same terms provided by a national collective bargaining agreement. *Id.*

During 1992, the Pension Fund received communications from "Reimer Express Enterprises, Ltd." and "Reimer Express Lines." App. B at 5a. These communications also originated in Winnipeg and concerned ICTL's obligation to contribute to the Pension Fund on behalf of its employees. *Id.*

In May 1993, ICTL went out of business, and ceased contributing to the Pension Fund. This triggered pension withdrawal liability under the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* App. B at 5a. The Pension Fund assessed ICTL with withdrawal liability in the amount of $310,922.12. *Id.* at 6a. The Fund sued ICTL for this withdrawal liability and obtained a judgment, but that judgment proved to be uncollectible. *Id.*

Thereafter, the Pension Fund sued REE and REWCOR in the U.S. District Court for the Northern District of Illinois. App. B at 6a. The Pension Fund based its claims against Defendants REE and REWCOR upon the MPPAA "controlled group" rule (29 U.S.C. § 1301(b)(1)). This rule requires that all trades or businesses under "common control" with an employer that incurs a withdrawal from a multiemployer pension fund must pay the resulting withdrawal liability.

REE and REWCOR moved to dismiss the Pension Fund's claim on the grounds of lack of personal jurisdiction. The district court granted this motion. App. B at 7a.

On October 18, 2000, the Seventh Circuit affirmed the district court's decision. The Seventh Circuit noted that this Court has admonished "that 'mechanical' tests generally should not be relied upon in determining when personal jurisdiction is constitutional." App. B at 16a, *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S.Ct. 2174, (1985). However, the Seventh Circuit held that a defendant's "corporate affiliation [with a company that operates in the forum state] cannot serve as a basis for personal jurisdiction over" the defendant—even where a statute expressly declares that the defendant is subject to liability based upon this corporate affiliation. App. B at 19a. Thus the Seventh Circuit held that a corporate affiliation with a business that operates in the forum state would *always* be treated as failing to "meet constitutional minimums." App. B at 18a-19a. According to the Seventh Circuit, there is no need to examine the specific legal and factual background presented in the case if defendant's only contact with the forum comes through a corporate affiliation with another entity. The Seventh Circuit held that under those circumstances,

> [t]he laws on which the suit are based [are] *irrelevant* because a state or federal statute cannot transmogrify insufficient minimum contacts into a basis for personal

> jurisdiction by making these contacts elements of a cause of action, since this would violate due process.

App. B at 17a (emphasis added; citation omitted).

On November 17, 2000, the Seventh Circuit denied the Pension Fund's petition for rehearing. App. A at 1a-2a.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE *DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS.*

A. The decisions of this Court and other circuits concerning specific jurisdiction do not permit defendant's contacts with forum to be analyzed in isolation from the specific legal claims in each case.

Under the statute at issue in this case, the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, a corporate *affiliate* (*e.g.*, a parent corporation) of an employer that withdraws from a multiemployer pension plan is liable for the "withdrawal liability" incurred by the employer that actually contributed to the multiemployer plan on behalf of its employees. *See* 29 U.S.C. § 1301(b)(1) (all "trades or businesses" under "common control" are treated as a "single employer"); *see, e.g., Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 142 (3rd Cir. 1997) (businesses that are in the "same controlled group" with the withdrawn employer are subject to withdrawal liability). In this case, the Seventh Circuit held that a foreign parent corporation which, six years after the passage of MPPAA, became affiliated with an employer contributing to the Pension Fund, and which knew of and actively facilitated the employer's participation in the Pension Fund, was not

subject to personal jurisdiction in the United States for a MPPAA claim.[1]

In so holding, the Seventh Circuit articulated a test for personal jurisdiction that conflicts with the prior decisions of this Court and with the personal jurisdiction analysis applied by other federal circuits. The Seventh Circuit's approach to personal jurisdiction represents a break from prior case law because the Seventh Circuit has held that certain contacts

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[1] This Court has taken up issues involving MPPAA, including the constitutionality of that statute under the Fifth Amendment Due Process Clause, on several occasions. *See, e.g., Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 118 S.Ct. 542 (1997); *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 115 S.Ct. 981 (1995); *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S.Ct. 2264 (1993); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 106 S.Ct. 1018 (1986); *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984).

The purpose of MPPAA is to require each employer participating in a multiemployer pension plan to be responsible for a proportionate share of the plan's "unfunded vested benefits." *See, e.g., Connolly*, 475 U.S. at 217. Unfunded vested benefits represent the shortfall between the present value of the pension fund's assets, as compared to the present value of the vested pension benefits the plan will be obligated to pay out in the future. *Id.*; 29 U.S.C. §§ 1381, 1391. However, employers only become obligated to pay withdrawal liability when they "withdraw" from the pension plan—that is, when they partially or completely cease making contributions to the plan on behalf of their employees. 29 U.S.C. §§ 1383, 1385.

Under the MPPAA "controlled group" liability rule, a parent corporation is jointly and severally liable for any withdrawal liability triggered by one of its subsidiaries. *See, e.g., Santa Fe Pacific Corp. v. Central States*, 22 F.3d 725 (7th Cir. 1994), *cert. denied*, 513 U.S. 987 (1984). Congress enacted the "control group" liability rule to "prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities." *Connors v. Ryan's Coal Co.*, 923 F.2d 1461, 1468 (11th Cir. 1991) (citation omitted).

between the defendant and forum state are intrinsically insufficient to support personal jurisdiction, no matter how closely linked to the litigation and the specific legal claims in a given case those contacts may be. As a result, the Seventh Circuit's decision has important implications, not only in cases involving MPPAA (and other statutes which predicate liability upon corporate affiliation), but in *all* cases in which personal jurisdiction is at issue.[2]

In *Helicopteros Nacionales le Columbia, S.A. v. Hall*, 466 U.S. 408, 414, 104 U.S.Ct. 1868, 1872 (1984), this Court reviewed the due process requirements applicable to issues of personal jurisdiction:

> Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940). When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that *a relationship among* the *defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction. Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed. 683 (1977).

(emphasis added.) In *Helicopteros*, this Court also noted that "when a state exercises personal jurisdiction over a defendant

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[2] The Seventh Circuit correctly held that the "forum state" at issue in this case is the United States as a whole. App. B at 12a-13a. This is so because liability under a federal statute (ERISA) at issue, and the statute (29 U.S.C. §§ 1132(e), 1451(d)) provides for nationwide service of process. *Id.*

arising out of or related to the defendant's contacts with the forum, the state is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 415, n. 8 (citation omitted). On the other hand, "general jurisdiction" is proper when a defendant has "continuous and systematic contacts" with a state and it allows a defendant to be sued in that state regardless of the subject matter of the lawsuit. *Id.* at 408. *See also Consolidated Development Corporation v. Sherritt*, 216 F.3d 1286, 1291-92 (11th Cir. 2000) ("the nature and quality of [minimum] contacts . . . vary depending upon whether the type of personal jurisdiction being asserted is specific or general"; the due process minimum contact requirements of general jurisdiction are "more restrictive" than those of specific jurisdiction).

" '[M]inimum contacts' . . . for specific jurisdiction purposes is satisfied by actions, or even just a single act, by which the nonresident defendant 'purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.' " *Ruston Gas Turbines, Inc. v. Donaldson Company, Inc.*, 9 F.3d 415, 419 (5th Cir. 1993), *quoting Burger King Corp.*, 471 U.S. at 475. Moreover, "[t]he non-resident's 'purposeful availment' must be such that the defendant 'should *reasonably anticipate* being haled into court' in the forum state." *Id.*, *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567 (1980) (emphasis added).

In contrast, the Seventh Circuit's decision in this case holds that *regardless* of whether the conduct alleged against the defendant made it clearly foreseeable that defendant would be "haled into court" in the forum state, there are certain types of contacts with the forum which *per se* fail to qualify as constitutionally significant minimum contacts. The Seventh Circuit stated:

> To decide whether *specific personal jurisdiction* may be exercised, a court must engage in three distinct steps *in the following order*: (1) identify the contacts the defendant has with the forum; (2) analyze whether these contacts meet *constitutional minimums* and whether exercising jurisdiction on the basis of these minimum contacts sufficiently comports with fairness and justice; (3) determine whether the sufficient minimum contacts, if any, arise out of or are related to the causes of action involved in the suit. If the court determines at the second step that a defendant does not have sufficient minimum contacts with the forum, then its personal jurisdiction analysis ends without examining the plaintiff's causes of action. The laws on which the suit are based would be *irrelevant* because a state or federal statute cannot transmogrify insufficient minimum contacts into a basis for personal jurisdiction by making these contacts elements of a cause of action, since this would violate due process.

App. B at 17a (emphasis added; citation omitted).

Under this standard, the Seventh Circuit held that Respondents' conduct in purchasing and becoming affiliated with a corporation that operated in the United States could *never* form the basis of a minimum jurisdictional contact, regardless of the consequences of that corporate affiliation dictated by U.S. law and the specific claims at issue in the case. Yet it was undisputed that the "controlled group" relationship which the Respondents entered with ICTL (the subsidiary that participated in the Pension Fund) was the *proximate and clearly foreseeable cause* of the withdrawal liability asserted by the Pension Fund against Defendants. Therefore, Defendants "should *reasonably [have] anticipate[d]* being haled into court" in the United States, *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added), in the event their subsidiary incurred a withdrawal from the

Pension Fund. Further, in holding that a defendant's corporate affiliation should be disregarded *per se* as a "minimum contact," the Seventh Circuit ultimately utilized the sort of "mechanical" approach to personal jurisdiction which (as the Seventh Circuit acknowledged) this Court has cautioned should be avoided. App. B at 16a, citing *Burger King* 471 U.S. at 478, 105 S.Ct. 2175. Under the Seventh Circuit's analysis, certain contacts between the defendant and the forum must be peremptorily disregarded, without considering the relationship between those contacts and the specific legal and factual claims in the case. This holding by the Seventh Circuit conflicts with this Court's directive that where specific jurisdiction is invoked, "a *'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction.*" *Helicopteros*, 466 U.S. at 414, *quoting Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579 (1977) (emphasis added).

Consistent with this articulation of the specific jurisdiction doctrine by this Court, various federal circuits have noted that the nature and quality of the "minimum contacts" with the forum necessary to satisfy due process *vary* depending upon the specific substantive law and allegations at issue in a given case. *See, e.g., Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994) ("The availability of specific jurisdiction depends on the relationship among the defendant, the forum and the litigation."); *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987) (a forum state "may . . . assert specific jurisdiction depending on the quality and nature of the defendant's contacts with the forum state *in relation to the cause of action*") (emphasis added); *Hertzberg & Noveck v. Spoon*, 681 F.2d 474, 479 (6th Cir. 1982) ("The minimum contacts test is a *flexible standard* which responds to different factual situations.") (emphasis added). However, in this case, the Seventh Circuit insisted that the "minimum contacts" test represents a monolithic and inflexible standard which cannot be varied in light of the statute or other substantive law at

issue in a specific case: "[A] federal statute cannot transmogrify, insufficient minimum contacts into a basis for personal jurisdiction by making these contacts elements of a cause of action . . . ." App. B at 17a. It is the very essence of the specific jurisdiction doctrine as established by this Court that what constitutes insufficient "minimum contacts" in one case may become constitutionally sufficient (become "transmogrified" in the phrasing of the Seventh Circuit) in another case because of differences in the legal claims and factual allegations.

As we have seen, under the decisions of this Court, the issue of the ability of the defendant to *foresee* a claim of the type asserted against him in the forum state is the hallmark of the specific jurisdiction doctrine. *See, e.g., World-Wide Volkswagen*, 414 U.S. at 292. Foreseeability can only be gauged by reference to the concrete facts and legal claims of each case. The substantive law on which the suit is based thus has a significant impact upon the foreseeability issue, and therefore upon the "minimum contacts" analysis. But the Seventh Circuit's analysis compels courts to exclude certain types of contacts with the forum as *per se* insufficient for purposes of personal jurisdiction, *regardless* of the degree to which the defendant's forum contacts made the specific claim at issue in the case foreseeable to the defendant.

This is contrary to the conventional formulation of the specific jurisdiction doctrine as advanced and articulated by this Court and generally followed in the circuits; that doctrine was intended to determine whether minimum jurisdictional contacts with the forum state have been satisfied *in light* of the specific circumstances and legal claims in each case. On the other hand, the Seventh Circuit's decision holds that courts should conduct a threshold analysis that disregards certain contacts with the forum, regardless of the specific circumstances of the case. Using this approach, the Seventh Circuit held that corporate affiliation with an entity that does

business in the forum state will always fail to qualify as a "minimum contact." It is unclear what other sorts of conduct would also, under the test posed by the Seventh Circuit in this case, be *per se* excluded as a minimum contact. The Seventh Circuit's decision has therefore articulated a new standard for personal jurisdiction which conflicts with the decisions of this Court and with other circuits, and has implications far beyond the theater of withdrawal liability litigation under MPPAA.

B. The prior decisions of this Court allow consideration of the ownership of property by the defendant as a sufficient "minimum contact."

The jurisdictional contact at issue in this case is Respondents" *ownership* of a corporation which, as Defendants knew, had extensive operations in the U.S. and participated in a multiemployer pension plan located in the U.S. In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569 (1977), this Court held that a defendant's ownership of property that is located in, or has an impact upon, the forum state may be a sufficient "minimum contact" with the forum state for jurisdictional purposes, depending upon the specific legal claims and factual allegations in a given case: "[T]he presence of property in a state may bear upon the existence of jurisdiction by providing contacts among the forum State, the defendant and the litigation." 433 U.S. at 207. In *Shaffer*, the Court ultimately determined that the facts of that case did not present a sufficient relationship (for jurisdictional purposes) between the defendant's ownership of the property at issue, and the liability asserted against the defendant. *Id.* 433 U.S. at 213 ("the underlying cause of action [is not] related to the property").

However, the *Shaffer* opinion makes clear that a defendant's ownership of property that has an impact upon the forum state cannot simply be dismissed *per se* as an insufficient jurisdictional contact. The Court reiterated this

point in *Rush v. Sauchuk*, 444 U.S. 320, 328, 100 S.Ct. 571, 577 (1980):

> We held in Shaffer that the mere presence of property in a state does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction *over an unrelated cause of action. The ownership of property in the State is a contact between the defendant and the forum, and it may suggest the presence of other ties.*

(emphasis added.)

However, in this case the Seventh Circuit held that a defendant's ownership of property (*e.g.*, a subsidiary corporation) located in or affecting the forum state would *always* be an insufficient "minimum contact"—even in a case in which, pursuant to statute, the defendant's very act of ownership (*i.e.*, corporate affiliation) gave rise to the liability asserted against the defendant. This further demonstrates the Seventh Circuit's departure from the personal jurisdiction analysis formulated by this Court and followed in other circuits.

The Seventh Circuit's divergence from the accepted jurisdictional analysis resulted in part from its insistence that this case implicated the nostrum that "the activities of the subsidiary [cannot] be used as a basis for personal jurisdiction over the parent . . . ." App. B at 17a. However, Respondents' decision to enter and maintain a controlled group relationship with an entity that participated in the Pension Fund was Respondents' *own act*, not the act of their subsidiary corporation.

C. It is impossible to reconcile the Seventh Circuit's decision with the analysis of this Court and other circuits concerning the importance of "foreseeability" in personal jurisdiction issues.

The Respondents in this case (and in particular Respondent REE) had a clear opportunity to foresee that their affiliation with an employer that contributed to the Pension Fund would give rise to the withdrawal liability claim that was asserted in this case. Respondent REE entered into a corporate affiliation with ICTL in 1986—six years *after* the enactment of MPPAA and its rule of "controlled group" liability. App. B at 4a. Respondent REE clearly knew that ICTL operated in the United States and participated in the Pension Fund; indeed, REE's personnel department (located in Canada) repeatedly communicated with the Pension Fund's offices in Rosemont, Illinois concerning ICTL's participation in the Pension Fund. App. B at 4a-5a.

In the personal jurisdiction context, the mere ability of the defendant to foresee that his conduct would give rise to an injury in the forum state is usually not enough to establish minimum contacts. *World-Wide Volkswagen*, 444 U.S. at 297. "But the foreseeability that is critical to the due process analysis . . . . is that the defendant's conduct and connection with the forum state are such that he could reasonably anticipate being haled into court" in the forum state. *Id.*

Under this test for foreseeability, manufacturers who have introduced products into the stream of commerce, and have exhibited an intent to serve the market in the forum state (as, for example, by designing the product to suit the special needs of that market), are subject to suit in the forum state for injuries caused by their product. *See, e.g., Clune v. Alimak AB*, 233 F.3d 538, 542 (8th Cir. 2000) ("personal jurisdiction may be exercised consonant with due process 'over a corporation that delivers its products into the stream of

commerce with the expectation that they will be purchased by consumers in the forum State' "), *quoting World-Wide Volkswagen*, 444 U.S. at 297-98, 100 S.Ct. 559; *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243 (2nd Cir. 1999) (finding jurisdiction over a Japanese corporation that placed its defective product in the stream of commerce with the expectation that the product would be marketed in the forum state).

In these "stream of commerce cases," the forseeability of suit in the forum state is not as clear and well defined as in this case. In this case, Respondents' potential for incurring withdrawal liability to the Pension Fund was expressly spelled out by statute, and this liability *arose from* the statutorily-defined "controlled group" relationship with a U.S.-based corporation which Respondents elected to create and maintain. This clear foreseeability of withdrawal liability under the MPPAA "controlled group" rule was recently discussed in *Central States Pension Fund v. Creative Development*, 232 F.3d 406, 419 (5th Cir. 2000):

> If there are some who feel that *controlled group rules* produce unduly harsh results or set traps for the unwary, they should not turn a blind eye to all the facts that [defendants], as well as able counsel, knew or should have known .... They had to have known, for example, that [the subsidiary business] (1) employed union labor, (2) were parties to a [collective bargaining agreement], (3) were participating employers in a multiemployer plan pursuant to the [collective bargaining agreement], (4) were approaching imminent [insolvency or shut-down] and (5) would, by virtue of [insolvency or shutdown] cease to participate in that multiemployer plan, leaving a substantial deficit in funding and thus withdrawal liability.

(emphasis added.) Each of these "known or should have known" factors relating to the consequences of entering a

"controlled group" relationship as enumerated in *Creative Development* is equally applicable to the Respondents in this case.

Moreover, Respondents' liability in this case did not come from a faceless mass of consumers who may have come into contact with Respondents" product—as in the "stream of commerce" case. Pursuant to statute, Respondents clearly and specifically owed withdrawal liability *to the Pension Fund* in the event Respondents' subsidiary incurred a withdrawal from the Fund.

The Seventh Circuit was correct in noting that the commencement and maintenance of a parent-subsidiary relationship does not " '*automatically* establish jurisdiction.'" App. B at 16a, *quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473 (1984) (emphasis added). However, when the specific circumstances and legal context of *this* case are added to the mix, the corporate affiliation is sufficient. As noted, these specific circumstances add the vital element of foreseeability; Respondents' relationship with the ICTL had a clear and distinct impact under the U.S. scheme of pension regulation. Therefore, in this case, the Pension Fund has not attempted to use the "unilateral activity" of ICTL (the subsidiary corporation) as a basis for jurisdiction over ICTL's parent corporations—as the Seventh Circuit's decision suggests. App. B at 17a. Again, at issue here are the parent corporations' *own activities* in forming and maintaining a parent-subsidiary bond with a subsidiary which they knew operated in the U.S. and participated in the Pension Fund. Further, although in general "a company's owners reasonably expect that they cannot be held liable for the faults of the company" (App. B at 17a), the passage of MPPAA in 1980 altered what these Defendants could "reasonably expect." "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be

ossified forever." Lon Fuller, *The Morality of Law*, 60 (1964).[3]

Therefore, the Seventh Circuit's decision in this case is at odds with the foreseeability analysis articulated in the personal jurisdiction decisions of this Court and other circuits.

D. The Seventh Circuit's analysis disregards forum contacts that (1) gave rise to the claim at issue and (2) are substantively relevant to the cause of action.

It is important to note that Respondents' forum contacts are not merely "related to" the cause of action at issue in this case. Rather, Respondents' forum contacts—*i.e.*, their control group relationship with a corporate subsidiary operating in the U.S. and participating in the Pension Fund—

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[3] The Seventh Circuit's decision is *not*, as that court suggested, supported by *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590-91 (9th Cir. 1996). App. B at 18a. That case only held that in the context of CERCLA liability, the jurisdictional contacts of a subsidiary would not automatically be attributed to the parent corporation. As the Seventh Circuit noted, and as the *AT&T* opinion anticipated (*see* 94 F. 3d at 590 n.8), the law is now clear that CERCLA liability cannot be imposed on a parent corporation because of the conduct of a polluting subsidiary *unless* the corporate veil can be pierced. App. B at 18a-19a, *citing United States v. Bestfoods*, 524 U.S. 51, 61-62, 118 S.Ct. 76 (1998). Under this controlling legal standard, the court in *AT&T* correctly concluded that it could not establish liability over the parent. This is so because the court in *AT&T* also concluded that there was no basis to pierce the corporate veil. 94 F.3d at 591. However, MPPAA creates a wholly separate liability standard and does *not* require a showing that the corporate veil should be pierced before the parent can be held jointly and severally liable for the withdrawal of the subsidiary. Since 1980, MPPAA has broadcast to parent corporations that by becoming a part of (or remaining in) the chain of ownership with companies that contribute to a multiemployer pension plan the parent corporations are exposing themselves to withdrawal liability.

actually *gave rise* to the cause of action asserted against them. That is, Respondents' controlled group relationship with the withdrawn employer is a vital element of the very cause of action asserted against them in this case. Further, given the clear foreseeability of the withdrawal liability claim that resulted from Respondents' controlled group relationship with a company that participated in the Pension Fund, that relationship must fairly be said to be a *proximate cause* of the liability asserted in this case.

Several of the federal circuits do not go so far as to *require* a showing of proximate causation between the defendant's forum contacts and the liability asserted in the case in order to establish personal jurisdiction; these circuits apply a less stringent test of "but for" causation. *See, e.g., Nowak v. Tak How Investments, Ltd*, 94 F.3d 708, 715 (1st Cir.), *cert. denied*, 520 U.S. 1155 (1997) ("[A] proximate cause standard is likely to enable defendants to better anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation," *however*, "strict adherence to a proximate cause standard in all cases is unnecessarily restrictive"); *Ballad v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (We rely on a '*but for*' test to determine whether a particular claim arises out of forum-related activities . . . .") (emphasis added); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n. 21 (5th Cir. 1981) ("a forum contact [that] is a 'but for' causative factor for the tort" at issue in a case can form the basis of personal jurisdiction). Other circuits appear to insist upon the more strict "proximate cause" standard. *See, e.g., United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street*, 960 F.2d 1080, 1089 (1st Cir. 1992); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983).

But the Seventh Circuit's decision in this case is at odds with both the circuits posing a "but for" cause test *and* with "proximate cause" circuits. No matter how the test for

determining whether the defendant's forum contacts have "given rise" to the claim is formulated for purposes of deciding specific jurisdiction cases, it must be concluded that Respondents' forum contacts meaningfully gave rise to the withdrawal liability claim at issue in this case. This is so because Respondents' controlled group relationship with the withdrawn MPPAA employer is a "but for" cause *and* a proximate cause of the withdrawal liability asserted against them. This contact and relationship with the forum is also "substantively relevant" to the cause of action asserted in this case. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup.Ct.Rev. 77, 82-83, 85-86 (arguing that the only forum contacts meriting consideration in specific jurisdiction analysis are *those material in proving liability under the substantive law at issue in the case.*) [4]

The Seventh Circuit stated that personal jurisdiction should not be "confuse[d]" with liability. App. B at 17a. This statement is true as far as it goes, but the Seventh Circuit ignored the need to examine the *relationship* between defendant's forum contacts and the substantive allegations in the case. The Seventh Circuit also stated:

> In many circumstances, the conduct of a foreign defendant may *satisfy the elements of liability contained in a statute*, but this defendant will escape liability because personal jurisdiction is lacking.

App. B at 18a (emphasis added). But in this case it was not just that a foreign defendant's conduct "satisfied the elements of liability contained in a statute." The key issue for personal

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[4] At least one commentator has criticized the "substantive relevance" standard as imposing a restriction on forum states' jurisdiction that is not necessary under the Due Process Clause. Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv.L.Rev. 610, 653-54 (1988). But even under this restrictive standard, personal jurisdiction was established in this case.

jurisdiction—and the issue left out completely under the standard articulated by the Seventh Circuit—is whether defendant's conduct *impacting the forum state* in itself satisfied one of the elements of the cause of action. Consequently, the Seventh Circuit endorsed a test for determining personal jurisdiction that denigrates the essential relationship among the defendant, the forum and the substantive claims in the litigation.

E. The Seventh Circuit's decision is at odds with the decisions of this Court and the other circuits concerning the need to examine the "reasonableness" of the exercise of jurisdiction.

Once "purposeful availment" [*i.e.*, minimum contacts with the forum state] has been established, the forum's exercise of jurisdiction is presumptively reasonable. *Burger King*, 471 U.S. at 476. In order to rebut that presumption, a defendant must present a compelling case that the exercise of jurisdiction would in fact be unreasonable. *Id.* For the reasons stated above, in this case, the Pension Fund satisfied the "purposeful availment" (or minimum contacts) requirement. Therefore, the burden should have shifted to the Respondents to show that the exercise of jurisdiction by the courts of the United States would have been unreasonable. Moreover:

> [T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: *an especially strong showing of reasonableness may serve to fortify a borderline showing of minimum* contacts.

Ticketmaster—New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994); *accord Burger King*, 471 U.S. at 477 (emphasis added).

In evaluating whether the exercise of jurisdiction is reasonable, a court should consider, (1) the burden of defendant of litigating in the forum, (2) the interest of the forum in this case, (3) the interest of the plaintiff in obtaining relief, (4) judicial economy and (5) the shared interest of the several states in the fundamental substantive policies at issue. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113, 107 S.Ct. 1026 (1987).

The Seventh Circuit's failure to consider these "reasonableness" factors further demonstrates that court's departure from conventional jurisdictional analysis. The United States has a strong interest in assuring that *foreign* members of withdrawal liability controlled groups are held responsible for the portion of this liability dictated by MPPAA. Any other result would shift the burden of pension funding unduly to domestic employers and their corporate affiliates. *See* Pension Benefit Guaranty Corporation Opinion Letter ("PBGC Op. Ltr.") 97-1 (agency responsible for interpreting MPPAA opines that foreign controlled group member is subject to MPPAA; the "purpose [of MPPAA] would be ill-served by a controlled group principle that did not apply to all entities under common control"). Ultimately, those dependent upon multiemployer plans for their pensions are placed at risk when members of a withdrawal liability "controlled group" are permitted to escape the share of responsibility for pension funding allocated to them under MPPAA.[5]

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[5] The Respondents also moved to dismiss below on the asserted ground that the Pension Fund was attempting to give MPPAA an improper "extraterritorial" reach. Because the Seventh Circuit found no personal jurisdiction, it did not decide the issue of extraterritoriality. However, it was undisputed that the withdrawal from the Pension Fund occurred in the

It should also be recalled that the MPPAA controlled group rule applies to parent corporations even if they are *not* aware that their subsidiaries have participated in a multiemployer pension plan. *See, e.g., Central States Pension Fund v. Slotky*, 956 F.2d 1369, 1375 (7th Cir. 1992) (controlled group rule does not violate due process requirements, even where parent or owner of corporation which participated in a pension plan only received indirect notice (*i.e.*, notice to subsidiary corporation but not actual notice to owner or parent) of withdrawal liability assessment). It is manifestly against the interest of the United States to blunt the operation of this rule simply because the parent corporation happens to be located across the U.S. border in Canada. But it is particularly inappropriate to give a "free pass" to a foreign corporations such as Respondents which had *actual notice* of their subsidiary's participation in a multiemployer pension plan located in the U.S., and indeed facilitated and managed the subsidiary's relationship with the pension plan. App. B at 4a-5a. The personal jurisdiction analysis employed by the Seventh Circuit gives an undeserved competitive advantage to foreign corporations over businesses that are resident in this country.

Withdrawal liability is a unique creature of statute under the pension laws of the United States. Therefore, this is not a

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United States, and the Pension Fund's statutorily defined loss or injury was felt there. Although there is a presumption that Congress does not intend to give federal statutes an extraterritorial effect, "the presumption is generally not applied where the failure to extend the scope fo the statute will result *in adverse effects within the United States.*" *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C.Cir. 1993) (emphasis added). *See also Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir.), *cert. denied*, 525 U.S. 1114 (1999) (in analyzing extraterritoriality "courts seek to determine whether actions 'occurring in foreign countries ha[ve] caused *foreseeable and substantial* harm to interests in the United States' ") (emphasis added; citations omitted). Therefore, this case does not involve an extraterritorial application of a federal statute. *Accord* PGBC Op. Ltr. 97-1.

case in which the Plaintiff Pension Fund can go to a foreign forum to seek redress—as is, of course, frequently the case in personal injury and other tort cases. This highlights the strong interest of the United States and of the Pension Fund in allowing the courts of this country to exercise jurisdiction over the Respondents in this case.

On the other hand, the Respondents made no showing that requiring them to respond to the withdrawal liability action would create an undue burden for them. Nor was there any indication in this case that the substantive policies of the nation of Canada would be offended by a finding of U.S. jurisdiction over the Respondents in this case.

Therefore, the Seventh Circuit's failure to conduct an inquiry into the reasonableness of the exercise of jurisdiction in this case is in conflict with the decisions of this Court and the other circuits.

II. THIS CASE PRESENTS ISSUES OF PUBLIC IMPORTANCE.

The Seventh Circuit's decision in this case was not merely wrong; it articulates a new legal standard applicable to personal jurisdiction issues under the Due Process Clause of the Fifth Amendment of the Constitution of the United States. As we have seen, under the Seventh Circuit's standard, certain contacts between the defendant and the forum state are to be disregarded as *per se* insufficient to support personal jurisdiction, no matter how tightly bound those forum contacts may be to the specific factual allegations and legal claims in a particular case. This standard contradicts a wealth of decisions by this Court and other circuits holding that the sufficiency of a forum contact must *always* be tested in light of the relationship the contact has with the substantive claims in the case.

The contact at issue in this case is essentially Respondents' *ownership* of an entity that was located in or impacted the

forum state. Therefore, the Seventh Circuit's decision calls in question any effort to exercise jurisdiction based on a defendant's ownership of property in the forum—even where the property itself, or indeed the ownership relationship itself—gives rise to the cause of action at issue in the case. Under the Seventh Circuit's analysis in this case, other types of "indirect" relationships with a forum which heretofore would have been at least *candidates* for consideration as "minimum contacts" (subject to a determination as to whether the relationship with the forum gave rise to the specific cause of action at issue) will now likely be excluded as *per se* insufficient to support personal jurisdiction.

Moreover, even if the logical reach of the Seventh Circuit's decision in this case could be limited to situations involving statutes imposing liability upon the basis of corporate affiliation, it should be noted that MPPAA is not the only statute containing this type of liability rule. *See, e.g., Branch v. U.S.*, 69 F.3d 1571, 1579 (Fed.Cir.), *cert. denied*, 519 U.S. 810 (1996) (Financial Institutions Reform, Recovery and Enforcement Act commands that *sister* banks owned by the same bank holding company as a bank that causes a loss to the Federal Bank Insurance Fund are also liable for the loss; this statute does not violate the Fifth Amendment Takings Clause); *Donohoe v. Consolidated Operating & Production Corp.*, 982 F.2d 1130, 1138 (7th Cir. 1992) (majority owners of a corporation that issued shares that are the subject of an action under the Securities Exchange Act of 1934 may be liable as "controlling persons" of that corporation). The Seventh Circuit's decision in this case represents a judicial encroachment upon these statutes not warranted by the Fifth Amendment Due Process Clause. This in itself is an issue of public importance which warrants review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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